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No. 00-537

In The

Supreme Court of the United States

ALAN FRIED,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Respondent United States of America ("the Government") spends a significant portion of its Brief in Opposition to the Petition for a Writ of Certiorari ("Opp. Brf.") attempting to convince this Court that the Eighth Circuit's decision below was correct. *See* Opp. Brf. at 7-13. Not only are such arguments erroneous (as pointed out in Alan Fried's Petition for a Writ of Certiorari ("Petition") and below), but they also gloss over the clear, irreconcilable split between the circuits on what the Eighth Circuit describes as "an important [question] for the statutory scheme created by Congress for the regulation of broadcasting." *U.S. v. Any and All Radio Station Transmission Equip., et al., (Laurel Avenue)*, 207 F.3d 458, 462 (8th Cir. 2000), A-11. In this reply, Petitioner Alan Fried ("Fried") responds, first, to the Government's assertions regarding the conflicts between the circuits on the issue raised in his Petition and, second, to the Government's incorrect arguments concerning the ultimate merits of this case.

I. THE GOVERNMENT CANNOT DISPUTE THE FACT THAT A DIRECT SPLIT EXISTS AMONG THE CIRCUITS ON AN IMPORTANT QUESTION INVOLVING THE REGULATION OF BROADCASTING.

The Government concedes, as it must, that a clear conflict exists on the jurisdictional issue in this case between the Eighth and Sixth Circuits, but argues that this Court's "review is not warranted at this time." Opp. Brf. at 13. In attempting to convince this Court to deny certiorari, the Government lapses into an analysis of the merits of Petitioner's argument, claiming that the "invalidity under the First Amendment of the FCC's minimum power requirements for radio stations would not provide a defense to forfeiture based on broadcasting without a license." Opp. Brf. at 14. The Government's argument is incorrect, as set forth more extensively in the second section of this brief, but the ultimate question of

whether Fried's constitutional defenses to the forfeiture action are meritorious or not is entirely irrelevant to the issue of whether he can *raise* these arguments *at all* in the District Court. The Sixth Circuit in the *Strawcutter* case clearly held that a microbroadcaster could raise constitutional defenses when the Government brought a forfeiture action. *United States v. Any & All Radio Station Transmission Equip. ("Strawcutter/Maquina Musical")*, 204 F.3d 658, 667 (6th Cir. 2000). Likewise, the D.C. Circuit in *Pleasant Broadcasting v. F.C.C.*, 564 F.2d 496 (D.C. Cir. 1977), held that broadcasters must raise defenses in the District Court, not the Appellate Court, in forfeiture actions. Conversely, the Eighth Circuit held the exact opposite in the case below. *Laurel Avenue, supra.*

The Government argues that review by this Court is unwarranted because "there is reason to believe the Sixth Circuit may reconsider its current position." Opp. Brf. at 16. But apart from noting the fact that the Sixth Circuit in *Strawcutter* relied in part on Judge Morris Arnold's now vacated opinion in the case below, the Government offers absolutely no support for this clairvoyant claim. The Government tries to cast further doubt on the "vitality" of the Sixth Circuit's *Strawcutter* ruling by pointing to a subsequent Sixth Circuit decision, *La Voz Radio de La Communidad v. FCC*, 223 F.3d 313, 318 (6th Cir. 2000). But the decision in *La Voz*, which, contrary to the Government's contention (Opp. Brf. at 17) nowhere cites to Judge Arnold's concurring opinion in the previous *Laurel Avenue* decision, in fact clearly supports the continuing viability of *Strawcutter* in the Sixth Circuit. Unlike the microbroadcaster in *Strawcutter*, the broadcaster in *La Voz* initiated an action in federal district court *against* the Government. As the Sixth Circuit explained:

> It is one thing to say, as this court did in *Strawcutter*, that a microbroadcaster may raise constitutional arguments as a shield to defend itself in a forfeiture action brought by the government when the forfeiture action was not preceded by any formal administrative action. But it is

> entirely another thing to say that a microbroadcaster can initiate an action in the district court as a sword against the possibility of adverse administrative action in the future.

La Voz, 223 F.3d at 320. Far from undercutting Fried's argument, *La Voz* actually supports his arguments on the merits of the case while also further demonstrating the need for this Court to reach the vitally important jurisdictional issue at the heart of this case.[1]

A recent opinion by the Eighth Circuit, *United States v. Neset*, No. 98-3539, 2000 WL 1742042 (8th Cir. Nov. 28, 2000), demonstrates the continued viability of the *Strawcutter* decision. While two Eighth Circuit judges adopted the previous *Laurel Avenue* opinion under review here (including Judge McMillian, who sat on both panels), Circuit Judge Heany dissented in *Neset*, stating:

> I agree with the Sixth Circuit's decision in . . . *Strawcutter*, that district courts in this type of case have jurisdiction to hear First Amendment challenges to the Federal Communication Commission's prohibition of microbroadcasting in the context of an enforcement action filed

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[1] The Government attempts to diminish *Strawcutter*'s precedential force by claiming that it has not been applied by the Sixth Circuit to actually invalidate a forfeiture action. Opp. Brf. at 17-18. But this observation misses the mark for several reasons. First, the decision is less than a year old, so it should not be surprising that this case or a similar case in the Sixth Circuit addressing the substantive arguments concerning microradio regulations has not yet worked its way up to the appeals court. More importantly, however, the *Strawcutter* case was a jurisdictional decision, holding that microbroadcasters, like Fried, are entitled to raise defenses when the Government pursues them in an enforcement action. Accordingly, the Sixth Circuit sent the case back to the District Court, where the microbroadcaster may raise whatever defenses he wishes in a trial *de novo*, with the District Court then deciding the ultimate merits of those defenses.

> against them. Accordingly, I would remand to the district court for further proceedings.

The continuing conflicts, even among judges on the Eighth Circuit itself, demonstrate not only the continued viability of *Strawcutter*, but also the urgent need for this Court to resolve the conflict among the circuits.

Moreover, far from questioning the continuing viability of *Strawcutter*, as the Government contends (Opp. Brf. at 16), the Second and Ninth Circuits have in fact noted the sharp contrast between the appeals courts on the issue in need of resolution by this Court and presented in this Petition. *See* Fried's Petition at 12, 19 n.6. And contrary to the Government's assurance (Opp. Brf. at 17 n.10), the Ninth Circuit itself is conflicted over the proper forum to raise challenges to FCC regulations. The Ninth Circuit in *U.S. v. Dunifer*, 219 F.3d 1004 (9th Cir. 2000), held that a microbroadcaster could not raise constitutional arguments to a Government enforcement action, while in *Dougan v. FCC*, 21 F.3d 1488, 1489 (9th Cir. 1994), the same circuit unquestionably held that a broadcaster challenging the "constitutionality of the licensing regulations" must proceed in District Court.[2] While conflict within a circuit itself is not reason alone for this Court to grant certiorari, the unsettled state of the law between the Sixth, Eighth, and D.C. Circuits, in addition to the conflicting opinions in the Ninth Circuit, make it all the more necessary for this Court to resolve the issue.

Last, the Government claims that new rules recently adopted by the Federal Communications Commission ("FCC") counsel against this Court reviewing the decision below. As Fried acknowledged in his Petition, the

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[2] Nothing in *Dougan* suggests, as the Government contends (Opp. Brf. at 17 n.10), that its holding is limited to monetary as opposed to forfeitures of communications devices. As set forth in the next section of this reply brief, both monetary forfeitures at issue in *Dougan* and property forfeitures at issue in the instant case are governed by 47 U.S.C. § 504(a), which demands a trial *de novo* in District Court.

FCC has changed its rules to permit new microbroadcasters to apply for licenses, but the same rules flatly disallow any microbroadcaster who had previously engaged in unlicensed broadcasting, including Fried, from applying for licensure. *See* Petition at 6 n.1. Thus, contrary to FCC's contention (Opp. Brf. at 18), the new rules will not impact the numerous microradio cases ongoing throughout the country. Indeed, the fact that microbroadcasters who initially challenged the regulations are now foreclosed from legal broadcasting at all not only in itself raises constitutional issues (and keeps those cases from becoming moot), but ensures that the jurisdictional issue presented in this Petition will continue to arise. Accordingly, the need for resolution by this Court is grave.

II. THE GOVERNMENT'S POSITION ON THE MERITS OF THE CASE CONTRADICTS STATUTORY LANGUAGE AND RELEVANT CASE LAW.

The Government devotes the first portion of its reply brief to the merits of the instant matter, arguing that the Eighth Circuit decision was correct. Unquestionably, however, the Sixth Circuit, examining the exact same statutory provisions, came to the exact opposite conclusion. The crucial question for this Court in deciding whether to grant a writ is not whether the Eighth Circuit was correct, as the Government argues, but whether there is disagreement among the circuits on an important issue.

In its opposition brief, the Government slightly elaborates upon the cursory analysis of the statutory provisions contained in the decision below. In his Petition (at 20-26), Fried sets forth extensively why the Eighth Circuit's conclusion that the Appellate Court, rather than the District Court, has jurisdiction in this matter was wrongly decided under applicable law. Those arguments, largely unanswered by the Government in its opposition brief, will not be repeated here. Instead, Fried below responds

to the few additional arguments made by the Government on the merits question in this case not covered in Fried's Petition.[3]

The Government makes the specious argument that requiring an "initial regulatory decision by the Commission [FCC] followed by review in the court of appeals makes eminent sense," because the District Court is supposedly ill-equipped to handle these types of cases. Opp. Brf. at 9. But the question of whether the FCC's prohibition of microbroadcasters like Fried is unconstitutional, as Petitioner asserts, can be decided based on the evidence presented to the District Court without the need for an "administrative record," as the Government asserts. *Id.* Indeed, the legislative history of 47 U.S.C. § 504, the forfeiture statute, indicates that Congress rejected a "review on the administrative record." *Pleasant Broadcasting*, 564 F.2d at 501; *see also* Petition at 16-19. It is common for District Courts to pass upon the legitimacy of regulations without a prior administrative record hearing and record. *See, e.g.*, 5 U.S.C. § 703 (establishing jurisdiction in the district court to review agency action where no special statutory review proceeding established); *Public Citizen v. F.T.C.*, 829 F.2d 149 (D.C. Cir. 1987) (holding that District Court proper forum for the review of smokeless tobacco regulations).

Incredibly, the Government also argues that Fried is responsible for the lack of a final order in this case from

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[3] Surprisingly, the Government continues to rely on *FCC v. ITT World Communications*, 446 U.S. 463, 468 (1984), which, as explained in the Petition (at 23 n.7), is completely inapposite to this case. Moreover, the other case relied upon by the Government, *Columbia Broad. Sys., Inc. v. United States*, 316 U.S. 407 (1942), merely held that appellate review was appropriate in the first instance where no more specific special review jurisdictional statute mandated jurisdiction elsewhere. As Fried set forth in his Petition (at 20-24), a special jurisdiction statute such as § 504 trumps § 402, the statutory provision at issue in *Columbia Broad. Sys., Inc.*

which he can appeal. Opp. Brf. at 9-11. It claims that Fried could have either submitted an application for a license and a request for a waiver and then appealed an adverse decision to the Appeals Court *or* he could have petitioned for a rulemaking proceeding and mandamus the agency if it failed to act. *Id.* In making these arguments, the Government once again fails to recognize that *it* initiated this action against Fried. The Government, not Fried, chose a federal court proceeding as the place to determine Fried's rights. Fried raised his arguments as constitutional defenses, not as part of an original action against the FCC. No doubt many parties would love to prosecute actions while simultaneously denying the other party any defenses (while also suggesting that they seek to change the law in another forum). That, however, is not the law, and the Government cites no body of case law in support of this theory.

In addressing the Government's argument concerning the adequacy of Fried's waiver and license application, the Government seeks to relitigate the facts of this case at the Supreme Court level. Of course, such attempts should be rejected. The District Court presumed that Fried applied for a valid waiver (which, as pointed out in the Petition (at 9), the FCC never responded to, even though it was filed over four years ago). *See Laurel Avenue*, 207 F.3d at 461, A-7. In its attempt to challenge the established record in this case, the Government also foolishly suggests that in addition to making the waiver application, Fried should have also attached an application for a license. Such an application, however, would have flagrantly contradicted FCC regulations, which unambiguously stated: "[e]xcept in Alaska, no new Class D [microradio station] applications . . . are acceptable for filing. . . . " 47 C.F.R. § 73.512(c).

The Government's other alternative for Fried – petitioning the FCC for a change in the rules, and if the FCC did not act, petitioning for a writ of mandamus – is similarly inadequate. Of course, a defendant in an enforcement action is always free to seek a legislative or

administrative change in another forum rather than raising the unconstitutionality of the government's action as a defense, but petitioning for a change in the law is obviously no substitute for enforcement of one's rights in court. Moreover, as explained in the Petition (at 26-29), any ruling on a license application that impacts First Amendment rights must take place within a "specified, brief period" of time. *Freedman v. United States*, 380 U.S. 51, 59 (1965). The ability to bring a mandamus action after some unspecified period of inaction by the FCC has elapsed does not even come close to meeting the *Freedman* requirement that the application procedure be limited to a "specified, brief period." *Id.*

Finally, the Government argues, for the first time to Petitioner's knowledge, that 47 U.S.C. § 504(a) – the statutory provision at issue in the instant case and which provides for a trial *de novo* in district court – may in fact only apply to monetary forfeitures rather than property forfeitures at issue here. Opp. Brf. at 12. This assertion is directly contrary to the language of the subchapter at issue in this case. (For a more thorough review of the statutory provisions in this case, *see* Petition at 20-24). Subchapter V of the Communications Act provides for both monetary forfeitures and forfeitures of communication devices. In the instant case, the Government brought its action under § 510, but for the Government to enforce any type of forfeiture under the Communications Act, it must bring an action for the recovery of the forfeiture in District Court, pursuant to 47 U.S.C. § 504(a). Section 504(a) vests exclusive jurisdiction in the District Court to adjudicate forfeiture actions, and the statutory language could not be more clear: "The forfeitures provided for in this chapter . . . shall be recoverable . . . in the *district* where the person or carrier has its principal office. . . . *[A]ny* suit for the recovery of a forfeiture imposed pursuant to the provisions of this chapter shall be a trial *de novo*." (emphasis added).

The Government further claims that the "trial *de novo*" requirement "does not necessarily entail consideration of the validity of the FCC's low-power rules." Opp. Brf. at 12. The requirement of a trial *de novo*, however, by its very terms, contemplates a comprehensive consideration of the issues raised in the forfeiture, including any and all defenses asserted by Fried. *See, e.g., U.S.F.C.C. v. Summa Corp., Las Vegas, Nevada*, 447 F. Supp. 923, 925 (D. Nev. 1978) ("The words *'de novo'* mean that the Court should make an independent determination of the issues") (*quoting U.S. v. First City Nat'l Bank of Houston*, 368 U.S. 361, 368 (1967)); *State of Indiana v. Rethborg*, 396 N.E.2d 953, 955 (Ind. Ct. App. 1979), *reh'g denied* (1980) (in a trial *de novo*, "[a]ll questions may be presented which legitimately arise in the record").

Again, perhaps Fried's constitutional and other defenses would be successful, perhaps not, but that question is entirely irrelevant to the jurisdictional issue presented in this Petition: whether microbroadcasters are entitled to raise defenses when the Government initiates forfeitures actions in the District Court. This question, on which there is a clear split of authority among the circuits, does not require a determination of the merits of Fried's First Amendment claims. Fried and other microbroadcasters merely wish to have an opportunity to present defenses in District Court, as they are entitled to do under 47 U.S.C. § 504(a).

CONCLUSION

An unquestionable split of authority exists among the circuits on, as the court below recognized, "an important [question] for the statutory scheme created by Congress for the regulation of broadcasting" and a question on which there is no "precise precedent." *Laurel Avenue*, 207 F.3d at 462, A-11. The instant case provides the perfect opportunity for this Court to resolve this fundamental conflict and give much needed guidance to both the Government in its efforts to regulate broadcasting and to

small radio broadcasters who seek vindication of their First Amendment rights. For the reasons set forth in the Petition and this reply brief, Alan Fried respectfully urges this Court to grant his Petition.

Respectfully submitted,

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